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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 UNITED STATES OF AMERICA,
11 Plaintiff,

12 v.

13
14 JULIO SOLORZANO (12);
15 JOSE CORNEJO (16).
16 Defendants.

CASE NO. 12cr236-GPC
Related Case No. 16cv1455-GPC
16cv1410-GPC

**ORDER DENYING PETITIONERS'
MOTIONS TO VACATE, SET
ASIDE OR CORRECT SENTENCE
PURSUANT TO 28 U.S.C. § 2255
AND GRANTING CERTIFICATE
OF APPEALABILITY**

17
18 Petitioners Julio Solorzano and Jose Cornejo (collectively “Petitioners”),
19 proceeding with counsel, filed motions to vacate, set aside, or correct their sentence
20 pursuant to 28 U.S.C § 2255. (Dkt. Nos. 1967, 1968.) Respondent filed an omnibus
21 response to the petitions.¹ (Dkt. No. 2016). Petitioners filed their replies. (Dkt. Nos.
22 2021, 2022.) A hearing was held on January 30, 2017. (Dkt. No. 2042.) At the
23 hearing, the Court requested supplemental briefing on certain issues. (*Id.*) On
24 February 13, 2017, Respondent filed a supplemental brief and on February 20, 2017,
25 Petitioners filed a supplemental response. (Dkt. Nos. 2044, 2045, 2046.) Based on the
26 reasoning below, the Court DENIES Petitioners’ motions to vacate, set aside or correct

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28 ¹The government's response also included an opposition to motions to vacate, set
aside, or correct sentence filed by Rudy Espudo, Miguel Grado, and Jeremiah Figueroa.
(Dkt. No. 2016.)

1 their sentence.

2 **Background**

3 On January 19, 2012, the Grand Jury returned an Indictment charging 40
4 defendants with Racketeer Influenced and Corrupt Organizations Act (“RICO”)
5 conspiracy in violation of 18 U.S.C. § 1962(d) as well as numerous other counts for
6 their involvement in the Mexican Mafia in the North San Diego County area. (Dkt. No.
7 1.) A Second Superseding Indictment was returned on June 6, 2013 as to charges
8 against Petitioners Solorzano and Cornejo. (Dkt. No. 1115.)

9 Solorzano and Cornejo were tried by a jury on Count 1 of the Second
10 Superseding Indictment for Conspiracy to Conduct Enterprise Affairs Through a
11 Pattern of Racketeering Activity, 18 U.S.C. § 1962(d); Count 3 for Violent Crime in
12 Aid of Racketeering (Attempted Murder and Assault with a Dangerous Weapon of
13 R.T. and S.V.); and Count 20 for Discharge of a Firearm in Relation to a Crime of
14 Violence. (Dkt. No. 1115.)

15 In October 2013, a jury returned a verdict and found Solorzano and Cornejo
16 guilty of Counts 1 and 20 and not guilty of Count 3. (Dkt. Nos. 1438 (Cornejo), 1437
17 (Solorzano).) Cornejo and Solorzano subsequently entered into a written plea and
18 sentencing agreement that also resolved pending state charges of assault with a
19 semiautomatic firearm and robbery to be served concurrently with their federal
20 sentence. (Dkt. Nos. 1554 (Solorzano); 1555 (Cornejo).)

21 On October 23, 2013, Solorzano was sentenced to a term of 120 months in
22 custody on Count 1 and 120 months in custody on Count 20 to run consecutive to
23 Count 1 for a total of 240 months. (Dkt. Nos. 1559, 1586.) On October 23, 2013,
24 Cornejo was sentenced for a term of 108 months for Count 1 and 120 months as to
25 Count 20 to run consecutive to Count 1 for a total of 228 months. (Dkt. Nos. 1560,
26 1600.)

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Discussion

A. Legal Standard on 28 U.S.C. § 2255

Section 2255 authorizes this Court to “vacate, set aside, or correct the sentence” of a federal prisoner on “the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack[.]” 28 U.S.C. § 2255(a). To warrant relief under section 2255, a prisoner must allege a constitutional or jurisdictional error, or a “fundamental defect which inherently results in a complete miscarriage of justice [or] an omission inconsistent with the rudimentary demands of fair procedure.” United States v. Timmreck, 441 U.S. 780, 783 (1979) (quoting Hill v. United States, 368 U.S. 424, 428 (1962)).

B. Johnson v. United States Ruling

In Johnson v. United States, the United States Supreme Court held that imposing an increased sentence under the residual clause of the Armed Career Criminal Act of 1984 (“ACCA”) for “any crime punishable by imprisonment for a term exceeding one year . . . that – (ii) otherwise involves conduct that presents a serious potential risk of physical injury to another”, 18 U.S.C. § 924(e)(2)(B)(ii), violates the constitutional right to due process. Johnson v. United States, 135 S. Ct. 2551, 2555 (2015). The ACCA “imposes a special mandatory fifteen year prison term upon felons who unlawfully possess a firearm and who also have three or more previous convictions for committing certain drug crimes or ‘violent felon[ies].’” Begay v. United States, 128 S.Ct. 1581, 1583 (2008). The ACCA defines a “violent felony” as follows:

any crime punishable by imprisonment for a term exceeding one year
... that-
(i) has as an element the use, attempted use, or threatened use of
physical force against the person of another², or

²This section is referred to as the “elements” or “force” clause.

1 (ii) is burglary, arson, or extortion, involves use of explosives,³ or
2 otherwise involves conduct that presents a serious potential risk of
3 physical injury to another.⁴

4 18 U.S.C. § 924(e)(2)(B).

5 In Johnson, the Court held the ACCA’s residual clause is void for vagueness and
6 “imposing an increased sentence under the residual clause of the Armed Career
7 Criminal Act violates the Constitution’s guarantee of due process.” Johnson, 135 S.
8 Ct. at 2563. The Court explained that “[w]e are convinced that the indeterminacy of
9 the wide-ranging inquiry required by the residual clause both denies fair notice to
10 defendants and invites arbitrary enforcement by judges.” Id. at 2557. The Court
11 expressly stated the decision does not apply to the remainder of the ACCA’s definition
12 of violent felony or the four enumerated offenses. Id. Moreover, it rejected the
13 government and dissent’s position that “dozens of federal and state criminal laws use
14 terms like ‘substantial risk,’ ‘grave risk,’ and ‘unreasonable risk,’ suggesting that to
15 hold the residual clause unconstitutional is to place these provisions in constitutional
16 doubt” by responding, “[n]ot at all.” Id. at 2561.

17 Section 924(c) is a sentencing enhancement provision that provides a series of
18 mandatory consecutive sentences for using or carrying a firearm in furtherance of a
19 “crime of violence or drug trafficking crime.” See 18 U.S.C. § 924(c).⁵ Section

21 ³This section is referred to as the “enumerated offenses clause.” See Johnson,
22 135 S. Ct. at 2559, 2563.

23 ⁴ This section has become known as the “residual clause.” Id. at 2556.

24 ⁵Section 924(c)(1)(A) provides,

25 Except to the extent that a greater minimum sentence is otherwise
26 provided by this subsection or by any other provision of law, any
27 person who, during and in relation to any crime of violence or drug
28 trafficking crime (including a crime of violence or drug trafficking
crime that provides for an enhanced punishment if committed by the
use of a deadly or dangerous weapon or device) for which the person
may be prosecuted in a court of the United States, uses or carries a
firearm, or who, in furtherance of any such crime, possesses a firearm,
shall, in addition to the punishment provided for such crime of

1 924(c)(3) defines the term “crime of violence” as:

2 an offense that is a felony and –

3 (A) has as an element the use, attempted use, or threatened use of
4 physical force against the person or property of another, or

5 (B) that by its nature, involves a substantial risk that physical force
6 against the person or property of another may be used in the course of
7 committing the offense.

8 18 U.S.C. § 924(c)(3).⁶

9 **C. Analysis**

10 Petitioners argue that under Johnson, RICO conspiracy is no longer a “crime of
11 violence” under 18 U.S.C. § 924(c) because the definition of “crime of violence” under
12 residual clause of the ACCA, now declared unconstitutional, contains similar language
13 to the “crime of violence” definition under § 924(c). They further argue that RICO
14 conspiracy is also not a “crime of violence” under the force clause. Since RICO
15 conspiracy is not a crime of violence under the force clause and the residual clause,
16 their mandatory enhanced sentences should be corrected. Respondent contends that
17 despite Petitioners’ Johnson argument on the RICO conspiracy claim, Solorzano and
18 Cornejo would nevertheless be subject to the provisions of § 924(c) because they were
19 convicted of other “crimes of violence” under the Violent Crimes in Aid of
20 Racketeering Activity (“VICAR”) statute, 18 U.S.C. §§ 1959(a)(3) and (5). The jury

21 _____
22 violence or drug trafficking crime --

23 (i) be sentenced to a term of imprisonment of not less than 5 years;

24 (ii) if the firearm is brandished, be sentenced to a term of imprisonment
of not less than 7 years; and

25 (iii) if the firearm is discharged, be sentenced to a term of
26 imprisonment of not less than 10 years.

27 18 U.S.C. § 924(c)(1)(A).

28 ⁶ Courts have referred to subsection (A) as the “elements” or “force” clause and
subsection (B) as the “residual clause.” United States v. Abdul-Samad, No.
10-CR-2792 WQH, 2016 WL 5118456, at *3 (S.D. Cal. Sept. 21, 2016).

1 made specific findings that the § 924(c) offense occurred during and in relation to a
2 “crime of violence” predicated not only on RICO conspiracy but also attempted murder
3 in aid of racketeering and assault with a deadly weapon in aid of racketeering, which
4 are crimes of violence and a separate alternative basis to sustain their conviction under
5 the force clause of § 924(c). In their replies, Petitioners argue that the violent crimes
6 in aid of racketeering (attempted murder and assault with a dangerous weapon of R.T.
7 and S.V.) are not crimes of violence under the force clause of § 924(c).

8 The jury found Solorzano and Cornejo guilty of RICO conspiracy in Count 1, not
9 guilty of violent crimes, attempted murder and assault with a deadly weapon, in aid of
10 racketeering, in Count 3, and guilty for discharge of a firearm in relation to a crime of
11 violence as charged in Count 20 which include RICO conspiracy and attempted murder
12 and assault with a deadly weapon under VICAR.⁷ (Dkt. Nos. 1437 (Solorzano), 1438
13 (Cornejo).) Count 20 states that,

14 On or about August 20, 2011, within the Southern District of
15 California, defendants JULIO SOLORZANO and JOSE CORNEJO,
16 did knowingly and intentionally discharge a firearm during and in
17 relation to a crime of violence, to wit: the racketeering conspiracy
18 alleged in Count 1 of this Superseding Indictment, in that said
19 racketeering conspiracy involved the commission of the offenses
20 specified in paragraph 15, subparagraphs a and c, of Count 1; and the
21 violent crime in aid of racketeering alleged in Count 3 of this
22 Superseding Indictment in violation of Title 18, United States Code,
23 Sections 924(c)(1)(A) and 2 and Pinkerton v. United States, 328 U.S.
24 640 (1946).

(Dkt. No. 1115 at 66-67.)

25 ⁷The inconsistency in the jury’s verdict where it found Petitioners not guilty on
26 the substantive counts of violent crimes in aid of racketeering of assault with a deadly
27 weapon and attempted murder pursuant to 18 U.S.C. §§ 1959(a)(1) & (3) but then
28 found Petitioners guilty of discharge of a firearm in relation to the violent crimes in aid
of racketeering does not render the verdict defective. See United States v. Powell, 469
U.S. 57, 65 (1984) (inconsistent verdicts such as “verdicts that acquit on a predicate
offense while convicting on the compound offense” are not grounds for reversal);
United States v. Bracy, 67 F.3d 1421, 1430-31 (9th Cir. 1995). Petitioners do not
directly challenge the verdict.

1 The relevant portion of Count 20 is based on a violation of Count 3⁸ which
2 charged Solorzano and Cornejo with violent crime in aid of racketeering of attempted
3 murder in violation of California Penal Code sections 664 and 187(a), and assault with
4 a dangerous weapon in violation of California Penal Code section 245, which are both
5 in violation of 18 U.S.C. §§ 1959(a)(3) and (a)(5). (Dkt. No. 1115 at 61.)

6 VICAR punishes certain violent acts committed by a defendant “for the purpose
7 of gaining entrance to or maintaining or increasing position in an enterprise engaged
8 in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon,
9 commits assault resulting in serious bodily injury upon, or threatens to commit a crime
10 of violence against any individual in violation of the laws of any State or the United
11 States, or attempts or conspires so to do. . . .” 18 U.S.C. § 1959(a). Crimes under this
12 provision include attempted murder and assault with a dangerous weapon. Id. §§
13 1959(a)(3) & (5).

14 Petitioners’ § 924(c)(1)(A) convictions were predicated on the VICAR’s
15 attempted murder and assault with a deadly weapon, 18 U.S.C. §§ 1959(a)(3) or (a)(5),
16 in Count 20 of the Second Superseding Indictment. The attempted murder, in turn, was
17 predicated on California Penal Code sections 664 and 187(a), and the assault with a
18 deadly weapon was predicated on California Penal Code section 245.

19 **1. Assault with a Deadly Weapon**

20 Petitioners argue that assault with a deadly weapon is not a crime of violence

21

22 ⁸Count 3 states that,

23 On or about August 20, 2011, within the Southern District of
24 California, defendants JULIO SOLORZANO and JOSE CORNEJO, as
25 consideration for the receipt of, and as consideration for a promise and
26 an agreement to pay anything of pecuniary value from the Mexican
27 Mafia, and for the purpose of gaining entrance to and maintaining and
28 increasing position in the Mexican Mafia, an enterprise engaged in
racketeering activity, attempted to murder R.T. and S.V., in violation
of California Penal Code, Sections 664 and 187(a); and assaulted R.T.
and S.V., with a dangerous weapon, in violation of California Penal
Code, Section 245; all in violation of Title 18, United States Code,
Sections 1959(a)(3) and (a)(5) and 2.

(Dkt. No. 1115 at 61.)

1 under § 924(c) since the elements do not categorically involve the use, attempted use,
2 or threatened use of physical force.⁹ Respondent disagrees.

3 The Ninth Circuit has held that assault with a deadly weapon under California
4 Penal Code section 245(a)(2)¹⁰ is categorically a “crime of violence” as defined under
5 18 U.S.C. § 16(a) & (b).¹¹ United States v. Heron-Salinas, 566 F.3d 898, 899 (9th Cir.

6
7 ⁹Without legal authority, Petitioners urge the Court to consider the generic
8 definition of assault with a deadly weapon and murder instead of the state law
9 definition because while the Second Superseding Indictment charged both with the
10 California state definitions of assault with a deadly weapon and murder, the jury
11 instruction does not show whether the Court relied on California law or not. Based on
the generic definition of assault with a deadly weapon and murder, Solorzano and
Cornejo argue these crimes do not qualify as a crime of violence as they do not require
the intentional use of force.

12 Contrary to Petitioners’ argument, the Court notes that the jury instruction given
13 to the jury in this case on assault with a deadly weapon tracks the California Criminal
14 Jury Instruction No. 875 and the murder instruction tracks California Criminal Jury
Instruction No. 520. (Dkt. No. 2021, Cornejo’s Reply, Ex. F; Dkt. No. 2022,
Solorzano’s Reply, Ex. F.)

15 However, despite Petitioners’ arguments, the Court notes that in applying the
16 categorical approach, it must compare the elements of the crimes forming the basis of
17 Petitioners’ convictions (not the generic definition of the crimes) with the elements of
the “generic” crime, but in this case, it is a classification of crimes, namely “crime[s]
of violence.” See Descamps v. U.S., 133 S. Ct. 2276, 2281 (2013); Ramirez v. Lynch,
810 F.3d 1127, 1131 (9th Cir. 2016). Therefore, the generic definitions of assault with
a deadly weapon and murder are not applicable to the categorical approach as the
Court is required to analyze the elements of Petitioners’ crimes of conviction.

19 ¹⁰California Penal Code sections 245(a)(1) and (2) provide,

20 (a)(1) Any person who commits an assault upon the person of another
21 with a deadly weapon or instrument other than a firearm shall be
22 punished by imprisonment in the state prison for two, three, or four
23 years, or in a county jail for not exceeding one year, or by a fine not
exceeding ten thousand dollars (\$10,000), or by both the fine and
imprisonment.

24 (2) Any person who commits an assault upon the person of another
25 with a firearm shall be punished by imprisonment in the state prison for
26 two, three, or four years, or in a county jail for not less than six months
and not exceeding one year, or by both a fine not exceeding ten
thousand dollars (\$10,000) and imprisonment.

27 ¹¹Heron-Salinas held that assault with a firearm under section 245(a)(2) is
28 categorically a crime of violence under 18 U.S.C. 16(a) & (b). Heron-Salinas, 566 F.3d
at 899. Later, the Ninth Circuit in Dimaya held that the residual clause contained in 18
U.S.C. § 16(b) is unconstitutional after Johnson. Dimaya v. Lynch, 803 F.3d 1110 (9th

2009); see also United States v. Grajeda, 581 F.3d 1186, 1197 (9th Cir. 2009) (“[A]ssault with a deadly weapon or by means of force likely to produce great bodily injury under section 245(a)(1) is categorically a crime of violence under the element prong of § 2L1.2” relying on Heron-Salinas); Ramirez v. Lynch, 628 Fed. App’x 506 (9th Cir. Jan. 4, 2016) (“assault with a deadly weapon in violation of California Penal Code § 245(a)(1) is categorically a crime of violence as defined under the elements clause of 18 U.S.C. § 16(a)”).

The elements clause of 8 U.S.C. § 16(a) defines a “crime of violence” as

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another

18 U.S.C. § 16. Since the elements clause of 8 U.S.C. § 16(a) contains the same language as the elements clause of § 924(c)(3)(A), the Court concludes that assault with a deadly weapon under California Penal Code section 245(a) is a “crime of violence” under the elements clause.¹²

2. Attempted Murder

Next, Petitioners argue that attempted murder does not categorically involve the use, attempted use or threatened use of physical force since murder can be accomplished without any use of force. The government contends that courts have held

Cir. 2015), cert granted, 137 S. Ct. 31 (Sept. 29, 2016). However, subsequent courts have relied on the reasoning in Heron-Salinas to support their holding that section 245(a) is categorically a crime of violence under the elements clause of 18 U.S.C. § 16(a) and in similar provisions under U.S.S.G. §§ 2L1.2 and 4B1.1(b). See USA v. Rodgers, Case No. 08cr716-SI-1, 2016 WL 7337230, at *3 (N.D. Cal. Dec. 19, 2016) (concluding that Penal Code section 245(a) is a crime of violence under the force clause of U.S.S.G. § 4B1.1(b)); United States v. Garcia-Galiana, No. 15-110-LHK, 2016 WL 879832 (N.D. Cal. Mar. 8, 2016) (holding that conviction under California Penal Code section 245(a)(1) remains a crime of violence under U.S.S.G. § 2L1.2 despite Dimaya); United States v. Chilton, 2016 WL 6518665, at 6 (N.D. Cal. Oct. 11, 2016) (California Penal Code section 245(a) qualifies as a crime of violence under U.S.S.G. § 2L1.2.)

¹²While the Superseding Indictment does not specify what section of California Penal Code section 245 applies to Petitioners’ convictions, it appears that section 245(a)(2) for “any person who commits and assault upon the person of another with a firearm” is the relevant provision.

1 that murder constitutes a crime of violence since it involves the use, attempted use or
2 threatened use of physical force against a person.

3 To determine whether an offense, “attempted murder” is a “crime of violence,”
4 courts employ the “categorical” approach. See Taylor v. U.S., 495 U.S. 575, 600
5 (1990); Descamps v. U.S., 133 S. Ct. 2276, 2281 (2013). Courts “compare the
6 elements of the statute forming the basis of the defendant’s conviction with the
7 elements of the ‘generic’ crime—i.e., the offense as commonly understood. The prior
8 conviction qualifies as an [sentencing enhancement] predicate only if the statute’s
9 elements are the same as, or narrower than, those of the generic offense.” Descamps,
10 133 S. Ct. at 2281. The categorical approach helps “determine whether conduct
11 proscribed by the statute is broader than the generic federal definition.”
12 Rodriguez–Castellon v. Holder, 733 F.3d 847, 853 (9th Cir. 2013) (internal quotation
13 marks and citation omitted). In identifying the elements of the statute of conviction,
14 courts look not only to the text of the statute, but also to how state courts have
15 interpreted and applied the statute. Covarrubias Teposte v. Holder, 632 F.3d 1049,
16 1054 (9th Cir. 2011). A court must determine whether there exists “a realistic
17 probability, not a theoretical possibility, that the State would apply its statute to
18 conduct that falls outside the generic definition of a crime.” Gonzales v.
19 Duenas–Alvarez, 549 U.S. 183, 193 (2007). If “the federal generic offense is not itself
20 a crime, but rather a classification of crimes, like ‘crime[s] of violence,’ then we also
21 compare the crime of conviction with other crimes determined to fall within that
22 classification.” Ramirez v. Lynch, 810 F.3d 1127, 1131 (9th Cir. 2016) (citing Cerezo
23 v. Mukasey, 512 F.3d 1163, 1166 (9th Cir. 2008)). If the statute of conviction
24 criminalizes more conduct than the federal generic offense, the state conviction does
25 not fall within the federal definition and will not qualify as a crime of violence. Id.

26 In this case, the Court must compare California’s attempted murder statute with
27 the federal generic crime, or in this case, a classification of crimes, to wit: a crime of
28 violence, and more specifically, an offense that “has as an element the use, attempted

1 use, or threatened use of physical force against the person or property of another,” to
2 determine whether attempted murder criminalized more or less conduct than a “crime
3 of violence.” The Court must assess whether attempted murder has as an element, “the
4 use, attempted use, or threatened use of physical force against the person or property
5 of another.”

6 The Court first analyzes the generic definition of “use of physical force”
7 standard. In Leocal, the Supreme Court held that a “crime of violence” under 18
8 U.S.C. § 16(a), a statute almost identical to § 924(c)(3)(A), “is one involving the use
9 . . . of a physical force against the person or property of another” and “suggests a higher
10 degree of intent than negligent or merely accidental conduct.” Leocal v. Ashcroft, 543
11 U.S. 1, 9 (2004) (driving under the influence of alcohol and causing serious bodily
12 injury in an accident under state law was not a “crime of violence”). The “use of
13 physical force against another person (or the risk of having to use such force in
14 committing a crime), suggests a category of violent, active crimes” Id. at 11.

15 In Johnson v. United States, 559 U.S. 133 (2010) (“Johnson 2010”), the Supreme
16 Court held that “physical force” under the ACCA’s force clause, § 924(e), defining
17 violent felony, “means *violent* force – that is, force capable of causing physical pain or
18 injury to another person.” Id. at 140 (emphasis in original) (defendant’s prior battery
19 conviction under Florida law was not a “violent felony” under ACCA). The word
20 violent “connotes a substantial degree of force.” Id.

21 The Ninth Circuit has applied the definition under Johnson 2010 to other offense
22 provisions such as 18 U.S.C. § 16(a) and U.S.S.G. § 2L1.2.¹³ United States v. Bell,
23 158 F. Supp. 3d 906, 912 (N.D. Cal. 2016) (citing United States v.
24 Dominguez–Maroyoqui, 748 F.3d 918, 920–21 (9th Cir. 2014) (U.S.S.G. § 2L1.2);

25
26 ¹³Under U.S.S.G. § 2L1.2, crimes of violence is defined “as any of the following
27 offenses under federal, state, or local law: murder, voluntary manslaughter, kidnapping,
28 aggravated assault, a forcible sex offense, robbery, arson, extortion, the use or unlawful
possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as
defined in 18 U.S.C. § 841(c), or any other offense under federal, state, or local law
that has as an element the use, attempted use, or threatened use of physical force
against the person of another.” U.S.S.G. 2L1.2 (commentary)

1 United States v. Flores–Cordero, 723 F.3d 1085, 1087 (9th Cir. 2013) (U.S.S.G. §
2 2L1.2); Rodriguez–Castellon v. Holder, 733 F.3d 847, 854 (9th Cir. 2013) (18 U.S.C.
3 § 16(a)).

4 Then, in United States v. Castleman, — U.S. —, 134 S. Ct. 1405 (2014), the
5 Supreme Court held that “physical force” may be both direct and indirect such that use
6 of poison constitutes a use of force. Id. at 1414-15. The defendant was convicted of
7 a “misdemeanor crime of domestic violence” which involves a misdemeanor that
8 necessarily involves the “use . . . of physical force.” Id. at 1413. The Court explained
9 that generic “physical force” is met by the degree of force that satisfies a common-law
10 battery conviction. Id. “Physical force” is “‘force exerted by and through concrete
11 bodies’ as ‘opposed to intellectual force or emotional force.’” Id. at 1414 (quoting
12 Johnson, 559 U.S. at 138). Common law “force” includes an indirect application which
13 does not need to be applied directly to the body of the victim. Id. at 1414-15.
14 Moreover, the “use” of force requires the knowing or intentional application of force,
15 and therefore, “use” of force involves a “higher degree of intent than negligent or
16 merely accidental conduct.” Id. at 1415. In the example of using poison to kill
17 someone, the Court explained it is not the act of sprinkling the poison, but it is “the act
18 of employing poison knowingly as a device to cause physical harm and it does not
19 matter if the harm occurs directly or indirectly. Id.

20 In California, murder is defined as “the unlawful killing of a human being, or a
21 fetus, with malice aforethought.” Cal. Penal Code § 187(a). The jury was instructed
22 according with California Criminal Jury Instruction No. 520 for murder with the
23 relevant instructions being:

24 First, an individual committed an act that would cause the death of
25 another person; and second, when the individual acted, he would have
26 a state of mind called “malice aforethought.” A person acts with
27 “malice aforethought” if he unlawfully intended to kill. Malice
28 aforethought does not require hatred or ill will toward the victim. It is
a mental state that must be formed before the act that causes death is
committed. It does not require deliberation or the passage of any
particular period of time.

1 (Dkt. No. 2022 at 21-22.) Murder has two elements, an unlawful killing, and malice
2 aforethought. See United States v. Checora, 155 F. Supp. 3d 1192, 1197 (D. Utah.
3 2015). Courts have looked at the conduct element, “unlawful killing” in determining
4 that it involves use of “physical force.” Checora, 155 F. Supp. 3d at 1197 (“It is hard
5 to imagine conduct that can cause another to die that does not involve physical force
6 against the body of the person killed.”), United States v. Moreno-Aguilar, 198 F. Supp.
7 3d 548, 554 (D. Md. 2016) (finding that murder is not a crime of violence under the
8 force clause of § 924(c) strains common sense and, more importantly, could lead to the
9 absurd result that this, and other statutes, . . . would be called into question”, and
10 concluded that “unlawful killing, necessarily involved the use of physical force against
11 another and are crimes of violence.”).

12 Federal murder, 18 U.S.C. § 1111¹⁴ employs the same language as California’s
13 murder statute. The Ninth Circuit has held that under federal law “[b]oth first-and
14 second-degree murder constitute crimes of violence.” United States v. Begay, 567 F.3d
15 540, 552 (9th Cir. 2009), overruled on other grounds, 637 F.3d 1038 (9th Cir. 2011)
16 (affirming defendant’s firearm convictions under § 924(c) and holding that because the
17 evidence was sufficient to support convictions of murder in the second-degree, it was
18 sufficient to support the relevant element of § 924(c)); United States v.
19 Machado-Erazo, 986 F. Supp. 2d 39, 52 (D.C.D.C. 2013) (concluding that murder
20 under District of Columbia and Maryland law underlying a VICAR count is a crime of
21 violence under § 924(c)).

22 Petitioners argue that murder can be committed without violent physical force;
23 however, in making their argument, they incorrectly rely on the generic definition of
24 murder which only requires “causing” another’s death and does not require physical
25 force. (Dkt. No. 2021 at 10-11; Dkt. No. 2022 at 10-11.) Moreover, in their
26 supplemental reply, Petitioners contend that murder can be accomplished by non-

28 ¹⁴“Murder is the unlawful killing of a human being with malice aforethought.”
18 U.S.C. § 1111.

1 violent conduct and cite to cases where non-violent force was used for a murder
2 conviction. However, the cases Petitioners cite concern second-degree murder and not
3 first-degree murder. (Dkt. No. 2045 at 4-5; Dkt. No. 2046 at 4-5.) To find an offense
4 overbroad, there must be a “realistic probability, not a theoretical possibility,” that the
5 statute would be applied to conduct not encompassed by the generic federal definition.
6 Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007); accord United States v.
7 McGuire, 706 F.3d 1333, 1337 (11th Cir. 2013) (applying the “realistic probability”
8 standard to a crime of violence determination under section 924(c)(3)). To make that
9 showing, a defendant may demonstrate that the statute “was so applied in his own case.
10 But he must at least point to his own case or other cases in which the state courts in fact
11 did apply the statute in the special (nongeneric) manner for which he argues.” Id.
12 Petitioners have not demonstrated a realistic probability that first degree murder can
13 committed through non-violent conduct, nor can they. See Begay, 567 F.3d at 552
14 (stating that first and second degree murder constitute crimes of violence).¹⁵

15 Thus, because the § 924(c) convictions for either attempted murder and assault
16 with a deadly weapon constitute “crimes of violence,” the Court DENIES Petitioners
17 Solorzano and Cornejo’s petitions to vacate, set aside or correct sentence.

18 **D. Certificate of Appealability**

19 Rule 11 of the Federal Rules Governing Section 2255 Cases states, “[t]he district
20 court must issue or deny a certificate of appealability when it enters a final order
21 adverse to the applicant.” A certificate of appealability should be issued only where
22 the petition presents “a substantial showing of the denial of a constitutional right.” 28
23 U.S.C. § 2253(c)(2). A certificate of appealability “should issue when the prisoner
24 shows . . . that jurists of reason would find it debatable whether the petition states a
25 valid claim of the denial of a constitutional right and that jurists of reason would find
26 it debatable whether the district court was correct in its procedural ruling.” Slack v.

27 ¹⁵ Petitioners do not challenge whether the “attempt” part of “attempted murder”
28 is a “crime of violence.” Neither party has addressed this issue and the Court declines
to address this issue as it is unchallenged.

1 McDaniel, 529 U.S. 473, 484 (2000).

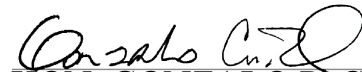
2 Although the Court DENIES Petitioners' petitions, the Court recognizes a
3 reasonable jurists could find the Court's assessment of Petitioners' claims debatable.
4 Thus, the Court GRANTS a certificate of appealability.

5 **Conclusion**

6 Based on the reasoning above, the Court DENIES Petitioners' motions to vacate,
7 set aside or correct sentence pursuant to 28 U.S.C § 2255.¹⁶ The Court also GRANTS
8 Petitioners a certificate of appealability.

9 IT IS SO ORDERED.

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11 DATED: May 17, 2017

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13 HON. GONZALO P. CURIEL
14 United States District Judge
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27 ¹⁶Based on the Court's ruling, it need not address the government's additional
28 arguments that Petitioners' procedurally defaulted on their challenge to § 924(c)(3)(B),
that they waived their right to collaterally attack their sentences and their request for
a stay.